APPENDIX
CONSTITUTIONAL AND STATUTORY PROVISIONS, AND RULES OR REGULATIONS

PAGE

United States Constitution:

Article I, Section 8—Power of Congress 11

Article III, Sections 1 (1) and 2 (2)—Powers of Courts 11

United States Statutes:

10 U. S. C. 1552—Boards for Correcting Military Records 11

28 U. S. C. 1491 (and 1973 pocket part)—Claims Court Jurisdiction 11

28 U. S. C. 2501—Limitation of Actions in Court of Claims 12

10 U. S. C. 8811—Enlisted Member-Discharge Before Term of Service Expires 12

10 U. S. C. 8914—Retirement—Twenty to Thirty Years —Regular Enlistment Members 12

United States Court of Claims' Rules:

Rule 37—Effect of Failure to Deny Petition 13

Court of Claims' Actions and Opinions:

Order of November 11, 1973, in case of Rynerson v. United States holding that Rynerson's claim was not barred by Statute of Limitations 13

Opinion of the Court of Claims in the case of Lindbergh Kirby v. The United States 14

Order Denying Reconsideration, Lindbergh Kirby v. The United States, No. 760-71 33

APPENDIX

Article I, United States Constitution:

Section 8. The Congress shall have Power . . . To constitute Tribunals inferior to the Supreme Court; United States Code (1964), volume 1, page xliii

ARTICLE III, United States Constitution:

Section 1. (1) The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish . . . US Code, (1964), vol. 1, p. xliv Section 2 (2) . . . the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

United States Code (1964), volume 1, page xlv

Title 10, US Code, (1964), Vol. 2, page 1247, Sec. 1552 70 A Stat. 116, Aug. 10, 1956 Ch. 1041:

(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice . . . .

(b) No correction may be made under subsection (a) unless the claimant or his heir or legal representative files a request therefor before October 26, 1961, or within three years after he discovers the error or injustice, whichever is later.

(June 25, 1948, ch. 646, 62 Stat. 933; Aug. 30, 1964 (pub. L. 88-519, 78 Stat. 699).

United States Code, 1964 Edition, Volume 7, page 5985:

Title 28, Section 1491, Paragraph 1:

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for

liquidated or unliquidated damages in cases not sounding in tort.

June 25, 1948, ch. 646, 62 Stat. 940.
28 USCA 1491 (1973 pocket part)

by amendment of 29 August 1972, 86 Stat. 652:

To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just".

This act shall be applicable to all judicial proceedings pending on or instituted after the date of its enactment.

1964 edition, volume 7, page 6040,

28 United States Code, 2501:

Every claim of which the Court of Claims has Jurisdiction shall be barred unless the petition thereon if filed within six years after such claim first accrues. (June 25, 1948, ch. 646, 62 Stat. 976).

10 United States Code, Section 8811 (b), 1964 ed. - - -

(b) No enlisted member of the Air Force may be discharged before his term of service expires, except—

(1) As prescribed by the Secretary of the Air Force;

(2) By sentence of a general or special court-martial; or

(3) As otherwise provided by law. (August 10, 1966, ch. 1041, Section 1, 70A Stat. 549).

10 United States Code, Section 8914, 1964 ed.

Under regulations to be prescribed - - - , a regular enlisted member of the Air Force who has at least 20, but less than 30, years of service computed under section 8925 of this title may, upon his request, be retired. - - (August 10, 1956, ch. 1041, Section 1, 70A Stat. 550).

Rules of the United States Court of Claims, loose-leaf, revised September 1, 1969:

Page 14, Rule 37. DEFENSES

(a) Form of Denials: A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies - - -

(b) Affirmative Defenses: In pleading to a preceding pleading, party shall set forth affirmatively accord and satisfaction, duress, estoppel, failure of consideration, fraud, illegality, laches, license payment release *res judicata,* statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense - - -

Page 15,

(c) Effect of Failure To Deny: Averments in a pleading to which a responsible pleading is required, other than those as to the amount of damages, shall be deemed admitted when not denied in the responsive pleading.

ORDER

WENDELL P. RYNERSON,

versus

THE UNITED STATES

Before COWEN, Chief Judge, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, Judges.

ORDER

This case comes before the court on defendant's motion filed May 10, 1971, to dismiss the petition and on plaintiff's motion, filed June 9, 1971, for summary judgment, having been submitted to the court on the briefs of the parties and oral argument of counsel for defendant and plaintiff, *pro se.*

The only claim on which plaintiff sues is for retired pay and that claim, which did not accrue until less than six years prior to the filing of the petition, is not barred by the statute of limitations. See *Sauer v. United States,* 173 Ct. Cl. 642, 354 F. (2d) 302 (1965); *Oceanic Steamship Co. v. United States,* 165 Ct. Cl. 217, 218-219 (1964); *Nager Electric Co., Inc. v. United States,* 177 Ct. Cl. 234, 240, 368 F. (2d) 847 (1966).

Plaintiff's contention that his discharge in 1945 merely released him from active duty is rejected; it is clear that the discharge separated him entirely from his reserve commission.

Plaintiff's contention that, in any event, the 1945 discharge was invalid raises triable issues of fact and law which cannot appropriately be decided on the arguments and documents presented on the motion for summary judgment.

IT IS THEREFORE ORDERED that defendant's said motion to dismiss the petition (which motion is based on the ground that the claim is barred by limitations) be and the same is denied.

IT IS FURTHER ORDERED that plaintiff's said motion for summary judgment is denied and the case is returned to the trial commissioner for trial on further appropriate proceedings.

BY THE COURT
Chief Judge

NOV. 11, 1973.

IN The United States Court of Claims
No. 760-71

(Decided May 11, 1973)

LINDBERGH KIRBY v. THE UNITED STATES

David E. Trice, attorney of record, for plaintiff.

Steven J. Bercik, with whom was Assistant Attorney General Harlington Wood, Jr., for defendant.

Before COWEN, Chief Judge, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG, and BENNETT, Judges.

ON PLAINTIFF'S MOTION AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Bennett, Judge, delivered the opinion of the court:

The plaintiff is a former Air Force master sergeant who on October 12, 1971, brought this suit pursuant to 28 U.S.C. X1491 in an attempt to recover active duty back pay and allowances and retired pay and allowances denied him as a result of an alleged illegal discharge he received from the Air Force on May 2, 1963. The court concludes with respect to the active duty pay claim that the plaintiff's petition must be dismissed as outside our jurisdiction for having failed to hurdle the threshold issue of the 6-year statute of limitations (28 U.S.C. X2501). With respect to the retired pay claim the petition must likewise be dismissed for failure to state a cause of action upon which relief can be granted. The pertinent facts follow:

The plaintiff first enlisted in the Army in June 1946. He transferred to the Air Force soon thereafter when that branch evolved from the Army Air Corps. Plaintiff served nearly continuous enlistments from June 1946 to May 2, 1963, at which time he received an honrable discharge from the Air Force.[1] Prior to his discharge, the plaintiff had served 16 years, 6 months and 23 days of creditable active duty. At the time of his discharge the plaintiff was in the process of serving a 6-year enlistment that had begun on July 10, 1961. Had he served through the full term of this last enlistment, he would have been eligible for retirement, having credit for more than 20 years of active service.

The discharge plaintiff received in May of 1963 grew out of an incident that occurred on November 21, 1962. On that date the plaintiff was arrested by the civilian authorities in Homestead, Florida, for having committed an undenied act of indecent exposure on the streets of that city. The civilian authorities released the plaintiff to the local Air Force authorities. He was admitted as a patient on November 23, 1962, at the Homestead Air Force Base hospital. On November 27, 1962, he was transferred to the hospital at Eglin Air Force Base for in-patient treatment and

[1] Plaintiff served through four continuous reenlistments except for a break from June 30, 1950 to October 9, 1950.

psychiatric evaluation. The results of the medical evaluations led to plaintiff's eventual discharge on the grounds of unsuitability, but only after a number of recommendations and opinions were received at discharge board proceedings. It is the conduct of these proceedings which the plaintiff alleges violated Air Force regulations and which, therefore, rendered his discharge invalid. The arguments presented by the plaintiff in this regard are challenging, but the court cannot now accept them as dispositive because plaintiff has slept on his rights to challenge the alleged irregularities within the time allowed by the statute of limitations for a judicial test.

Any examination of the applicability of the statute of limitations to a given set of facts should begin with the language of the statute itself. This statute 28 U.S.C. X2501, bars the Court of Claims from taking jurisdiction over a claim "unless the petition thereon is filed within six years after such claim first accrues." In his supplemental brief, the counsel for the plaintiff conceded that the claim for the active duty back pay which the plaintiff should have received if the alleged illegal discharge had not occurred in May of 1963, was clearly barred by the statute of limitations as interpreted by the court in *Mathis v. United States,* 183 Ct. Cl. 145, 391 F. (2d) 938 (1968), aff'd on rehearing, 190 Ct. Cl. 925, 421 F. (2d) 703 (1970). In that case, dealing with a claim for active duty pay, the court held that "the cause of action accrued all at once upon the plaintiff's removal." 183 Ct. Cl. at 147, 391 F. (2d) at 939. Thus, the petition filed by the plaintiff in October of 1971 came 8½ years after the plaintiff's discharge in May of 1963.

Following the discharge, plaintiff Kirby eventually applied to the Air Force Discharge Review Board, seeking to have it remove the bar to his future enlistment and to have the board change the nature of his discharge. After a hearing the Discharge Review Board, on September 28, 1967, denied the plaintiff's application. This was followed by an appeal to the Air Force Board for Correction of Military Records, which appeal was denied on January 17, 1968. It is clear that these post-discharge remedies which

the plaintiff pursued were permissive in nature and do not serve to toll the running of the statute of limitations. *Mathis v. United States, supra,* 183 Ct. Cl. at 147, 391 F. (2d) at 939; *Kirk v. United States,* 164 Ct. Cl. 738, 742-43 (1964); *Lipp v. United States,* 157 Ct. Cl. 197, 199, 301 F. (2d) 674, 675 (1962), *cert. denied,* 373 U. S. 932 (1963). Plaintiff does not contend otherwise. Therefore, as the plaintiff has conceded with respect to the claim for active duty pay, the petition was filed too late to be considered by the court. The second and more important issue left for the court's consideration is whether the plaintiff's claim for the retirement pay also falls if the claim for active duty pay is barred by 28 U.S.C. X2501. The question may be stated in this way: May plaintiff bring an action for retirement pay more than 6 years subsequent to the date of his final discharge when his entitlement to retirement depends upon invalidating the discharge?

In an affirmative answer to the foregoing question, plaintiff attempts to draw a distinction between the active duty claim and the retirement claim by arguing that if the discharge is found to be illegal as a matter of law, then he should receive constructive credit for the years still to be served under his last 6-year enlistment contract up to July 9, 1967, at which point he could have retired with more than 20 years of active service to his credit. Thus, since July 9, 1967, was the first time he would have been eligible for retirement it is claimed to be also the first time he could have sued for retirement pay and, therefore, is the date upon which his cause of action for retired pay first accrued for statute of limitations purposes. If all of the plaintiff's premises are accepted, it is clear that the petition filed in October of 1971 was timely with respect to the claim for retirement pay. But, note that plaintiff's pyramid of presumptions is based upon voiding the 1963 discharge over 8 years after receiving it.

In an effort to measure the merits of the plaintiff's thesis, attention should first be turned to the general rule found in *Oceanic S.S. Co. v. United States,* 165 Ct. Cl. 217, 225 (1964), for determining precisely when a cause of ac-

tion accrues for statute of limitation purposes. There the court held:

> A claim against the United States first accrues on the date when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action . . . (cites omitted.)

At 218 the court said, ". . . for this court no cause of action accrues before the claimant can bring a suit for money judgment." See also, *Nager Elec. Co. v. United States,* 177 Ct. Cl. 234, 252, 368 F. (2d) 847, 859 (1966). These were contract cases. The same standard applies where the Government's obligation arises as the result of a statute (as in the present case). *Sauer v. United States,* 173 Ct. Cl. 642, 647, 354 F. (2d) 302, 304 (1965).

While it seems clear that plaintiff Kirby could not have sued to receive his retirement benefits in any suit filed prior to the end of enlistment in July 1967 because he did not have 20 years of service, it likewise is clear that if he had successfully brought suit to recover his lost active duty pay within 6 years of his discharge he would automatically have received constructive credit for the time subsequent to his discharge, which would have rounded out the 20 years required for retirement by 10 U.S.C. 8914, and no suit for retirement would have been necessary. *Diamond v. United States,* 192 Ct. Cl. 502, 427 F. (2d) 1246 (1970). *Gearinger v. United States,* 188 Ct. Cl. 512, 412 F. (2d) 862 (1969). All events required to fix defendant's liability for the retired pay would thus have taken place within the limitations period. As the matter stands, however, the "all events" requirement to fix defendant's liability has never transpired so plaintiff's cause of action for a money judgment for retirement is nonexistent, having never accrued. It is true that entitlement to active duty back pay and retirement pay arise under different sections of the Code and accrue as the result of different events. Nonetheless, as noted above, there is a clear nexus between the two. Where the right to the first is demonstrated, the other may follow as a matter of course. It is the precise nature of this connection which requires further analysis.

In pertinent part, 10 U.S.C. . . . 8914 provides: ". . . a regular enlisted member of the Air Force who has at least 20, but less than 30, years of service computed under section 8925 of this title may, upon his request, be retired." In the past this court has denied a reserve officer the right to retirement benefits under a similar provision (10 U.S.C. . . . 1331) for failing to complete the qualifying 20 years of service. *Montilla v. United States,* 198 Ct. Cl. 48, 457 F. (2d) 978 (1972). The same unequivocal rule applies to an Air Force enlisted man under 10 U.S.C. 8914. The plaintiff has not served the required length of time to become eligible for the retirement benefits he now seeks. He attempts to avoid this obstacle by asking this court to re-examine and invalidate the May 1963 discharge proceedings in the context of this retirement claim, thereby giving him constructive credit for the years of active duty he did not serve between May 1963 and July 1967. Such a re-examination is clearly barred by the statute of limitations with respect to the active duty claim. As a result, the court does not feel that it has the power to hold otherwise in the context of the retirement claim. The stumbling block comes from the fact that once this plaintiff was officially discharged from the Air Force, he lost the right to earn future active duty pay and, since he had not, at that moment, completed 20 years of service, the future right to receive retirement pay and allowances lapsed as well. The plaintiff had 6 years in which to challenge in court the legality of his discharge in order to protect his right to fulfill his enlistment commitment and obtain the needed years of service for retirement. This he did not do and cannot be allowed to do at this time through the vehicle of the retirement claim. The one rests on the other like a house on a foundation; without the foundation, the house will not stand.

In reaching this result, the court is not stating a new rule. *Hames v. United States,* 164 Ct. Cl. 746, *cert. denied,* 377 U. S. 904 (1964); *Palmer v. United States,* 129 Ct. Cl. 322, 121 F. Supp. 643 (1954). In *Palmer,* for instance, the court reached a similar conclusion where the plaintiff was seeking to obtain the difference between the retirement pay

he would have received had he not allegedly been wrongfully demoted in 1944 from a hazardous duty position more than 6 years prior to filing the suit in 1953. *Palmer* alleged, as does *Kirby,* that procedural irregularities made his demotion (which he considered a wrongful discharge) invalid. The demotion to a nonhazardous duty position prevented the plaintiff from serving 20 years in the hazardous duty job, which was a prerequisite to receiving the higher hazardous duty retirement benefits. No back pay was claimed. Palmer retired in 1950. The court dismissed the petition on alternate grounds. First, the petition was filed too late: "Any claim based on that alleged removal (the demotion) is now barred by the six-year statute of limitations, 28 U.S.C. ...., 2501 (1952 ed.) . . ." 129 Ct. Cl. at 326, 121 F. Supp. at 645. The second basis for dismissing the petition rested on the plaintiff's failure to state a cause of action because the pertinent statute in that case required the plaintiff to spend 20 years of *actual* service in a hazardous duty position. The *Palmer* court treated the two bases for its decision as being completely independent of one another and there they plainly are, nothing in the opinion implying otherwise. However, we need not treat the facts of this case in precisely the same manner. As discussed before, the issue of when the statute of limitations begins to run, and when a plaintiff has stated a sufficient cause of action, may be interrelated, as here. In addition, this plaintiff does not need to show 20 years of actual service in order to qualify for the retirement benefits he now seeks. In *Gearinger v. United States, supra,* the court held, in a case where the statute of limitations was not an issue, that a serviceman can receive constructive active duty credit as part of a claim for active duty pay, which fulfills the requirements of the retirement statute. Plaintiff Kirby, however, has neither served the necessary 20 years, nor has he received constructive credit therefor. In effect, the plaintiff's right to sue for retirement benefits has never accrued and will not accrue until he actually serves the requisite number of years or receives constructive credit for the same by voiding the discharge in an action for his active duty pay.

These opportunities are closed to him by the *Mathis* case discussed, *supra;* thus, the plaintiff has not alleged a cause of action for which relief can by granted.

The language in the opinion in *Sauer v. United States, supra,* does not aid the plaintiff in this case. In *Sauer* the plaintiff, prior to 1944, had been employed by the Federal Bureau of Investigation where he had accumulated 89¼ days of unused annual leave. In 1944, the plaintiff transferred and sought to carry with him credit for the annual leave he had accumulated at the FBI. This request was finally denied him in 1953. The plaintiff did not sue to receive a lump sum amount for this uncredited unused leave until 1964, 3 years after he had retired from Government service. The defendant's primary defense was that the plaintiff's cause of action had accrued in 1944, or at the latest in 1953; therefore, the petition was too late when filed in 1964. In rejecting this position, the court noted that the statute which authorized a lump sum recovery for unused accumulated leave required the employee's separation from service as a prerequisite to making a claim for the money. Thus, it is clear that application of the *Oceanic S.S. Co.* test results in the starting of the statute of limitations on the separation of the employee from Government service since this is the last event required by statute before the claimant would be entitled to bring his suit. In the case at hand, as heretofore noted, the last event necessary before this plaintiff can sue for his retirement claim has not yet occurred and probably never will—the receipt of credit for 20 years of service.

Nothing that has been said thus far should be read to imply that the court is closing the door to the examination of events that have taken place more than 6 years prior to the filing of the suit. Where the plaintiff can allege a sufficient cause of action at the time the suit is filed, and where the last event necessary to sue has occurred less than 6 years before, the court is perfectly free to examine the operative facts determinative of the issues involved, even if they have taken place more than 6 years before. Neither is the court using the statute of limitations to foreclose the examination of an issue that is part of a larger, single

cause of action. With respect to the retirement claim, however, the plaintiff must allege that he has received credit (actual or constructive) for 20 years of service before he has stated a sufficient cause of action. Challenging the validity of the discharge as a means of obtaining constructive service time could only be done as a part of the active duty claim. Once the plaintiff has let that opportunity lapse, he has likewise lost the opportunity to challenge the discharge in the retirement context. Stated another way, when a plaintiff seeks retired pay based on 20 years of service he must be able to show either that he has that service by actually having served it or by having received constructive credit therefor by invalidating a discharge which prevented the required actual service. Plaintiff has done neither, so he states no cause of action for which relief can be granted within our jurisdiction, as heretofore noted. The back pay claim and the retirement claim are not severable under the facts of this case. The first underpins the second. The claim for back active duty pay is admittedly dead, killed by age and the affliction of the statute of limitations. The retirement claim here can exist only if the back pay claim exists so they must be interred together. It would be very strange, indeed, to allow recovery for the retirement claim and deny it for active duty when both claims depend upon voiding the same discharge.

Once the discharge became effective, the theoretical end of plaintiff's enlistment, which was thereby cut short, is meaningless for purposes of the statute of limitations or for determining when the retirement cause of action accrues. There is nothing harsh in this rule. At the moment a serviceman is discharged under conditions like these, he knows that he has not fulfilled the requirements necessary for retirement. It is incumbent upon him at that point to protect his right to serve further by timely attacking the discharge. He could do this by a suit for active duty back pay, reinstatement, mandamus, or declaratory judgment in an appropriate court. A timely challenge in this manner to the discharge would not accrue a cause of action for a 20-year retirement immediately but would make it foresee-

able by protecting the opportunity to earn it, which was not done here.

Prior to enactment of Pub. L. No. 92—415, on August 29, 1972, 86 Stat. 652, plaintiff could have sought declaratory judgment or restoration to his position only in the United States District Court and recovered back pay there for less than $10,000.00. Said Act, however, gave reinstatement jurisdiction to the Court of Claims "as an incident of and collateral to" a money judgment within its general jurisdiction to enter money judgments under the Tucker Act. This court does not have declaratory judgment jurisdiction except in renegotiation cases pursuant to Pub. L. No. 92—41, 3, 85 Stat. 97, 98 (1971). *Lykes Bros. S.S. Co. v. United States,* 198 Ct. Cl. 312, 459 F. (2d) 1393 (1972). The Court of Claims does not otherwise have general equity powers or declaratory judgment authority. *United States v. King,* 395 U. S. 1 (1969). These Acts did not affect the statute of limitations pertinent here. For instance, we cannot restore a discharged Government employee to his job if his claim for back pay is barred by the statute of limitations. Nor can we enter a declaratory judgment that plaintiff Kirby was wrongfully discharged when the time has elapsed within which we could give him a money judgment for back pay. To do so would be, in effect, reinstating plaintiff to his position for several years for retirement pay purposes, which, for reasons noted above, is beyond our authority. As stated in *United States v. King, supra,* before this court has jurisdiction it must be for "actual, presently due money damages from the United States." 395 U. S. at 3. Plaintiff's claim for retirement pay does not meet this test, for he has not proved that he has 20 satisfactory years of active service. In fact, he admits that he does not, so he has not alleged a cause of action for retired pay on which relief can be granted. This court cannot supply the years of service, nor waive the requirement, nor award the retired pay without such service, unless the plaintiff has a valid court judgment giving him credit for such service.

In *Sauer* the plaintiff could have filed an action in mandamus or a declaratory judgment suit at the time it became clear that he was not going to receive credit for

the leave he had accumulated at the FBI. The successful conclusion of such a suit in that case would not, however, have accelerated the time for the accrual of his cause of action since it was dependent on separation from the service. More important, the receipt of credit for the accumulated leave was nothing more than a paperwork transaction. There was no doubt at any time that plaintiff Sauer had actually accrued the unused annual leave which was the basis for the lump sum claim. The accumulated leave in that case corresponds to the 20 years of service in this case. The court could not have given the plaintiff in *Sauer* credit for the accumulated leave if he had not actually accumulated it while an employee of the FBI. The situation is the same in the case now before the court. By requiring the plaintiff to challenge his discharge within 6 years of the date it becomes effective, the court is asking the plaintiff to show actual or constructive credit for 20 years of service before he brings the suit and not to seek to raise himself by his own bootstraps by asking first for constructive credit for the lost years of service and then for retirement pay based on that credit, all in the same lawsuit. As the facts now stand, the plaintiff has not served the 20 years required by the statute for retirement. Until he has served or received constructive credit for such service he has no right to the retirement benefits he now seeks. The oral argument was made that this places a burden on a discharged serviceman who doesn't care to be restored to his position in the service because he is lucky enough to go out and find an equal or higher paying job as in *Palmer*. In such a case he must nevertheless contest the discharge when, in fact, he stands to gain no monetary recovery since he has no damages for lost pay. Under these circumstances, it is said, he should be allowed to sue for retirement pay at the time he would have retired. The short answer to this idea supporting the proposition that a man should be permitted to sue at his convenience, for retirement on the basis of time not served, is that if the serviceman is discharged without having served 20 years, and he is unwilling to protect his right to continue to serve within the reasonable

length of time provided by law, then he has no basis for seeking benefits that are supposed to accrue only to those who serve honorably for 20 years. Any other rule than here announced will lead to the filing of stale claims 25 years old, or older, and emasculate the statute of limitations. This is contrary both to law and public policy. *Friedman v. United States,* 159 Ct. Cl. 1, 11, 310 F. (2d) 381, 387—88 (1962). Our statute of limitations is jurisdictional and must be strictly construed to avoid prosecution of stale claims which defendant can be prejudiced in contesting because excessive lapse of time dulls memories, accounts for missing witnesses, and occasions periodic, routine destruction of Government records. *Crown Coat Front Co. v. United States,* 386 U. S. 503, 517 (1967); *Feldman v. United States,* 149 Ct. Cl. 22, 32, 181 F. Supp. 393, 400 (1960); *Dawnic S.S. Corp. v. United States,* 90 Ct. Cl. 537, 579 (1940).

In conclusion, the court finds that plaintiff Kirby has, with respect to the active duty pay claim, filed his suit beyond the period allowed by the statute of limitations. With respect to the claim for retirement pay, the plaintiff has not shown the necessary length of service requisite to bringing such a claim and he cannot obtain constructive credit for the missing years of service by challenging an alleged illegal discharge in the context of this claim for retirement benefits, for he waited too long. The plaintiff's motion for summary judgment is denied and the defendant's cross-motion is granted. The petition is dismissed.

Davis, Judge, dissenting in part:

This limitations problem has occasioned much deliberation, and the result is Judge Bennett's admirable opinion for the court, carefully keying the present decision to our prior reported rulings,[1] and explaining its rationale.

I think that the opinion is consistent with the court's earlier holdings in the limitations field (except as indicated in note 1, *supra*). My understanding of the under-

[1] I regret that the court does not acknowledge that it is overruling the unpublished order in *Ryncrson v. United States,* No. 57-71, dated November 11, 1971. Though it did not happen to be reported, the *Ryncrson* order, which was unanimous, came after oral argument and consideration by the then full court.

pinning of *Palmer v. United States,* 129 Ct. Cl. 322, 121 F. Supp. 643 (1954), and *Hames v. United States,* 164 Ct. Cl. 746, *cert. denied,* 377 U. S. 904 (1964), is that a plaintiff suing for retirement pay (military or civilian) cannot go into the lawfulness of an adverse administrative action (removal or demotion) which accrued more than 6 years before commencement of suit if there is some statute indicating that Congress wanted th eretired individual to have actually served the number of years required for retirement, for showing that Congress desired a particular administrative body to decide, on a discretionary basis, whether the plaintiff had learned or merited the particular type of retirement. In *Palmer* the court interpreted the "hazardous duty" retirement statute as requiring at least 20 years actual investigative work, and the opinion also indicated (129 Ct. Cl. at 326, 121 F. Supp. at 645) that under that statute the head of the department and the Civil Service Commission had substantial discretion to determine whether the employee deserved that kind of retirement. In *Hames,* there was a statute flatly disallowing credit "for any period of separation from the service in excess of three calendar days", which we interpreted as requiring the Civil Service Commission to leave out of account all periods of removal unless the employee had brought a timely action to set aside the removal as alleged. Rather than being based solely on limitations, both *Palmer* and *Hames* rested on a combination of limitations together with failure to state a claim for relief—*i. e.,* the substantive statute which the Government invoked as a defense prevented the claimant from having a proper claim for retirement pay unless he had timely brought suit to overturn the prior adverse administrative action. Under that rule, the question in each case is whether there is any substantive legislation or regulation (apart from the statute of limitations) which suggests that Congress would want the claimant not to wait until his retirement to test some prior adverse action.

As I see it, *Sauer v. United States,* 173 Ct. Cl. 642, 354 F. (2d) 302 (1965), and *Oceanic S.S. v. United States,* 165 Ct. Cl. 217 (1964), are consistent with this *Palmer-Hames*

rationale. In *Sauer,* the F.B.I. retirement pay had all been earned before the plaintiff transferred, and the court did not think that there was any statute or regulation (as there was in *Palmer* and *Hames* implying that *Sauer* had to bring a suit within six years (or earlier) of his transfer to this court (or of the refusal of our Clerk to credit that prior leave) to test the refusal to credit the leave. In *Oceanic* the situation was the same; there was no statute or regulation suggesting or calling for an earlier inquiry into the disputed substantive issue; on the contrary, the court thought that the applicable regulations were clear that the claimant did not have to sue until after a "final accounting" had been made by the defendant.

Although the court's decision in this case harmonizes with *Palmer-Hames-Sauer-Oceanic,* I depart from it, with some hesitation, because, unlike the majority, I do not see the military retirement statutes in the same light as the "hazardous duty" retirement legislation in *Palmer* or the statutory requirement in *Hames* that creditable service be actually served. I would avoid holding that in the military retirement system Congress has laid down the Procrustean requirement that the 20 years (or more) be actually served in all cases, except where suit is brought within 6 years of the adverse action. Congress did not say explicitly that the service had to be "actual" in all instances, and we have some leeway in inferring an intention to recognize "constructive" service where appropriate.

The hypothetical case which mainly troubles me is that of a serviceman who has been told by an official that he has enough years or points or credits for retirement, and, on the basis of that assurance, does not sue to set aside an early adverse action because he thinks that, apart from that adverse action, he still has enough eligibility for retirement; on retirement he suddenly discovers that the earlier representation was mistaken and that, in order to be eligible at all, he does have to overturn the prior adverse action. Under our recent decisions in *Montilla v. United States,* 198 Ct. Cl. ...., 457 F. (2d) 978 (April 1972) and *Parker v. United States,* 198 Ct. Cl. ...., 461 F. (2d) 806 (June 1972), the claimant could probably not say

that the Government was estopped. If we apply the majority's rule, it is hard to see how an exception could be made for this potential case; limitations is not a doctrine like laches which can be tailored to fit particular circumstances.[2]

To avoid such possible injustices, it seems to me preferable to hold that the claim for retirement pay does not accrue until retirement, and to rely on the equitable principles of laches—which apply to military pay cases, *Cason v. United States,* 200 Ct. Cl. ...., 471 F. (2d) 1225 (Jan. 1973)—to fend off stale claims and stale issues. A plaintiff who needlessly waited 20 years or so would find himself locked out by laches.

In this particular case, the time-lag was short, and there appears to have been no prejudice to the Government by the delay and accordingly I would hold laches not to be a bar. On the merits, I would hold for plaintiff but withhold giving my reasons since the court does not reach that issue.[3]

NICHOLS, Judge, dissenting:

I had written an opinion for the court coming to a conclusion opposite to that of Judge Bennett, as to retirement pay but apparently mine was convincing only in a negative sense. It would be standard procedure to use it as a dissent, or the starting point for one, but I refrain from doing so here. Much of it discusses the reasons why Lindbergh Kirby's discharge was illegal. The court says plaintiff's arguments are "challenging" which is perhaps an understatement, but I am not sure it is proper to publish comments which might have precedential value about the merits of a case the court holds it lacks jurisdiction to decide.

As to the statute of limitations, the court is plainly wrong in asserting it is not stating a new rule, citing *Hames v. United States,* 164 Ct. Cl. 746, *cert. denied,* 377

[2] 10 U. S. C. 1331 (d) and 1406 do not apply before October 1966, and, even after that date, do not apply to adverse actions reducing the number of years of creditable service upon which retired pay is computed.

[3] My dissent relates solely to the claim for retirement pay. I agree with the court as to active-duty pay.

U. S. 904 (1964) and *Palmer v. United States,* 129 Ct. Cl. 322, 121 F. Supp. 643 (1954). *Hames* is cited just because it cites *Palmer*. *Palmer* is the important decision. The court correctly states the facts therein, and correctly summarizes the holdings. It is clear the ground, as to hazardous duty, is a valid reason for the decision. You cannot constructively earn a hazardous duty annuity, but can only do so by performing twenty years of hazardous duty. As the court concedes, *however,* that rule is not relevant here, because it is possible to earn constructively an annuity of the type plaintiff here lays claim to *Palmer's* other ground, the statute of limitations, is plainly wrong. The original papers, retrieved for me from the Records Depository, show that Palmer had no money claim rising out of his unlawful demotion. After a brief period, he transferred to another Government agency at his old pre-demotion salary. He applied to the GAO, which paid him all he had lost while the demotion was in effect. He was not out of pocket one cent at that point. The published opinion in *Palmer* does not indicate the court was unaware of this. In saying that the demotion started our statute (28 U. S. C.—2501) running, it must have had in mind that *Palmer* could have sued for a declaratory judgment, or mandamus. In *Sauer v. United States,* 173 Ct. Cl. 642, 354 F. (2d) 302 (1965), obviously a more carefully considered decision, we held that the possibility of seeking remedies outside the Court of Claims, such as declaratory judgment or mandamus, does not start —2501, the Court of Claims statute, running. Only the availability of a money claim does that. I consider that *Sauer* overrules the *Palmer* holding on the statute of limitations, and *Palmer* should not be cited here unless the court is prepared to reinstate it and overrule *Sauer*. You can't treat a decision holding one thing and a decision holding the opposite, as both valid and binding authorities. Not only is *Palmer* bad law, but so is *Hames* in citing *Palmer* to dispose summarily of a claim that could have been thrown out for several other reasons.

I would have held that an unlawfully discharged soldier could waive his claim for active duty pay and sue for his annuity when, as here, he would have earned it within his

current enlistment, and the right to the annuity accrued less than six years before the suit was brought. If the majority will candidly concede they are fashioning new law, I will likewise concede I would have been if my view had prevailed. The fact is, the problem is one that, except once, we had not faced up to before. I thought that the careful analysis of the consequences of—2501 in *Oceanic S. S. Co. v. United States,* 165 Ct. Cl. 217, 225 (1964) and in *Sauer, supra,* pointed the way to my conclusion.

I also believed we had put our foot squarely on that path by reason of an order approved by a unanimous court, holding as stated above, in course of remanding a case for trial before a Commissioner. By some unhappy inadvertence, the order was not abstracted and published in the back of one of our official volumes, as important orders usually are. In the circumstances, I strongly defend the right of the majority herein not to cite or discuss this order, still less to feel bound by it. The citation of unpublished decisions is widely condemned, and justly so in my opinion. Its unfairness is illustrated by this case: Government counsel herein was aware of the order, but Lindbergh Kirby's counsel was not. I mention it, not to refute the majority, but to explain the evolution of my own position. But for it, I would never have had a strong and fixed attitude about the law applicable to this case, and I must now make a conscious effort to remove it from my mind.

Putting *Palmer* and *Anonymous,* then, both out of mind, we have an issue that should be approached as *res integra.* It is understandable for experienced judges to be concerned about stale claims. Despite all that 28 U. S. C.—2501 can do, and the related, anomalous, but well established doctrine of laches in pay cases, we face many situations where we must inquire into happenings that are ancient history to many now living. The Government Records Disposal Program creates a constant hazard that facts will have to be found on the basis of documents that once existed but do so no longer. As an example of the problem *Small v. United States,* 200 Ct. Cl.—, 470, F. (2d) 1020 (decided December 12 1972), will serve. Some of our judges thought our oaths required us to investigate matters occurring as far back as

1951 (nineteen years before suit was brought) despite the Government's good faith destruction of all records directly relating thereto. It is understandable to shy away from a construction of 28 U.S.C. 2501 which would add another class of such cases to those we already have. Regarding the prevailing opinion as a legislative document, it is carefully considered, thorough, and I would say, irrefutable on its own terms.

My own attitude is, however, that the writing of statutes of limitations, though necessary, is a function of legislatures, not of courts. The Government's consent to be sued is, of course, strictly construed, but we have, I think, endeavored to read 28 U.S.C. 2501 in a manner that is fair to claimants, too. I think courts should indulge a presumption in favor of their own jurisdiction, and be reluctant to deny anyone his day in court unless lack of jurisdiction is clearly the legislative will. Cf. *Charlson Realty Co. v. United States,* 181 Ct. Cl. 262, 384 F. (2d) 434 (1967), as an interesting example of judicial struggle with these principles.

Denial on the basis of subsidiary, judge-made encrustations on the statute is a form of judicial legislation. I would employ laches to defeat claims when the unexcused lapse of time in suing has worked real unfairness to the Government. It may be noted, however, that the records in Lindbergh Kirby's case have survived and his delay in suing has not really hurt anyone but himself.

Thus, even if a legislature which foresaw Kirby's claim would have provided against it, unless his suit was timely in Judge Bennett's terms, I would not now do the legislature's work. I would hold the plaintiff not barred by 28 U.S.C. 2501, and entitled to summary judgment in his favor on the cross motions, with respect to retirement pay only.

In The United States Court of Claims

versus

The United States

489-54 Harold H. Gearinger, as Executor of the Estate of Royal Barry Shaw.

259-70 Tom S. Acuna, et al., and four related cases (292-70, 349-70, 458-70 and 203-72).

326-70 Mrs. Winston Caldwell, Administratrix, and James J. Shanley.

461-70 Marvin J. Griggs.

57-71 Wendell P. Rynerson.

357-71 Robert H. McKelvy and Maxine McKelvy.

358-71 R. Hugh McKelvy and Tula E. McKelvy.

516-71 Kroppers-Clough, A Joint Venture.

554-71 Optimum Designs, Inc.

760-71 Lindbergh Kirby.

App. 9-72 The Sac and Fox Tribe of Indians of Oklahoma, et al.

315-72 Cyril K. Chappuis.

195-73 Athony George Galopin (formerly 257-64).

Before COWEN, Chief Judge, LARAMORE and DURFEE, Senior Judges, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG and BENNETT, Judges, except that Sr. Judge Laramore participated only in No. 489-54, Sr. Judge Durfee participated only in Nos. 489-54 and App. 9-72, Judge Kashiwa did not participate in Nos. 489-54 and App. 9-72, Judge Kunzig did not participate in No. 489-54 and Judge Bennett did not participate in Nos. 489-54 and 544-71.

ORDER

These cases come before the court on motions for rehearing, to vacate the order of the court, for reconsideration, for new trial, for amendment of judgment, for clarification, to reopen case and for further relief under Rules 151 and 152 of the Rules of this court and on consideration thereof.

IT IS ORDERED this 17th day of October, 1973, that said motions be and the same are denied as follows:

489-54 Harold H. Gearinger, as Executor of the Estate of Royal Barry Shaw. Plaintiff's motion for rehearing.

259-70 Tom S. Acuna, et al., and four related cases (292-70, 349-70, 458-70 and 203-72). Plaintiffs' motion for new hearing.

326-70 Mrs. Winston Caldwell, Administratrix, and James J. Shanley. Plaintiffs motion for rehearing.

461-70 Marvin J. Griggs. Plaintiff's motion to vacate order of the court and petition to reconsider.

57-71 Wendell P. Rynerson. Plaintiff's motion for a rehearing and plaintiff's motion for a trial and-or reconsideratoin.

357-71 Robert H. McKelvy and Maxine McKelvy.

358-71 R. Hugh McKelvy and Tula E. McKelvy. Plaintiffs' motion for amendment of judgment or rehearing.

516-71 Koppers-Clough, A Joint Venture. Defendant's motion for rehearing or clarification.

554-71 Optimum Designs, Inc. Plaintiff's motion to reopen case No. 554-71.

760-71 Lindbergh Kirby. Plaintiff's motion for reconsideration of court's decision of May 11, 1973.

9-72 The Sac and Fox Tribe of Indians of Oklahoma, et al. Motion of Appellee-cross-appellant (United States) for rehearing to amend order.

315-72 Cyril K. Chappuis. Plaintiff's request for rehearing and for remand.

195-73 Anthony George Galopin (formerly 257-64). Defendant's motion requesting the court to characterize plaintiff's submissions as a Rule 36 petition and to vacate due date for filing answer.

BY THE COURT
Wilson Cowen
Chief Judge

SKELTON, Judge, would allow the motions in Nos. 357-71, 358-71 and App. 9-72.

FILED
OCT. 17, 1973
COURT OF CLAIMS